

AN ACT

RELATING TO WORKERS' COMPENSATION; AMENDING A CERTAIN DEFINITION;  
AMENDING THE RESIDUAL PHYSICAL CAPACITY TABLE; PROVIDING FOR  
INCREASES IN ATTORNEY FEES AND ADVANCED DISCOVERY COSTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 52-1-25 NMSA 1978 (being Laws 1987, Chapter 235,

Section 11, as amended) is amended to read:

"52-1-25. PERMANENT TOTAL DISABILITY.--

A. As used in the Workers' Compensation Act, "permanent total  
disability" means:

(1) the permanent and total loss or loss of use of both hands or  
both arms or both feet or both legs or both eyes or any two of them; or

(2) a brain injury resulting from a single traumatic work-related  
injury that causes, exclusive of the contribution to the impairment rating arising from  
any other impairment to any other body part, or any preexisting impairments of any  
kind, a permanent impairment of thirty percent or more as determined by the current  
American medical association guide to the evaluation of permanent impairment.

B. In considering a claim for total disability, a workers' compensation  
judge shall not receive or consider the testimony of a vocational rehabilitation provider  
offered for the purpose of determining the existence or extent of disability."

Section 2. Section 52-1-26.4 NMSA 1978 (being Laws 1990 (2nd S.S.),  
Chapter 2, Section 15) is amended to read:

"52-1-26.4. PARTIAL DISABILITY DETERMINATION--PHYSICAL CAPACITY

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MODIFICATION.--

A. The range of the physical capacity modification is one to eight.

B. The award of points to a worker shall be based upon the difference between the physical capacity necessary to perform the worker's usual and customary work and the worker's residual physical capacity. The award of points shall be based upon the following table:

		RESIDUAL PHYSICAL CAPACITY					
		S	L	M	H		
PRE-INJURY	S	1	1	1	1		
PHYSICAL CAPACITY L	L	3	1	1	1		
(USUAL AND	M	5	3	1	1		
CUSTOMARY WORK)	H	8	5	3	1		

C. For the purposes of this section:

- (1) "H" or "heavy" means the ability to lift over fifty pounds occasionally or up to fifty pounds frequently;
- (2) "M" or "medium" means the ability to lift up to fifty pounds occasionally or up to twenty-five pounds frequently;
- (3) "L" or "light" means the ability to lift up to twenty pounds occasionally or up to ten pounds frequently. Even though the weight lifted may be only a negligible amount, a job is in this category when it requires walking or standing to a significant degree or when it involves sitting most of the time with a degree of pushing and pulling of arm or leg controls or both; and
- (4) "S" or "sedentary" means the ability to lift up to ten pounds occasionally or up to five pounds frequently. Although a sedentary job is defined as

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one that involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required only occasionally and other sedentary criteria are met.

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D. The determination of a worker's residual physical capacity shall be made by a health care provider defined in Subsection C, E or G of Section 52-4-1 NMSA 1978. If the worker or employer disagrees on who shall make this determination, the dispute shall be resolved in accordance with the provisions set forth in Section 52-1-51 NMSA 1978."

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Section 3. Section 52-1-54 NMSA 1978 (being Laws 1987, Chapter 235, Section 24, as amended) is amended to read:

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"52-1-54. FEE RESTRICTIONS--APPOINTMENT OF ATTORNEYS BY THE DIRECTOR OR WORKERS' COMPENSATION JUDGE--DISCOVERY COSTS--OFFER OF JUDGMENT--PENALTY FOR VIOLATIONS.--

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A. It is unlawful for any person to receive or agree to receive any fees or payment directly or indirectly in connection with any claim for compensation under the Workers' Compensation Act except as provided in this section.

B. In all cases where the jurisdiction of the workers' compensation administration is invoked to approve a settlement of a compensation claim under the Workers' Compensation Act, the director or workers' compensation judge, unless the claimant is represented by an attorney, may in his discretion appoint an attorney to aid the workers' compensation judge in determining whether the settlement should be approved and, in the event of an appointment, a reasonable fee for the services of the attorney shall be fixed by the workers' compensation judge, subject to the limitation of Subsection I of this section.

C. In all cases where the jurisdiction of the workers' compensation administration is invoked to approve a settlement of a compensation claim under the Workers' Compensation Act and the claimant is represented by an attorney, the total amount paid or to be paid by the employer in settlement of the claim shall be stated in the settlement papers. The workers' compensation judge shall determine and fix a reasonable fee for the claimant's attorney, taking into account any sum previously paid, and the fee fixed by the workers' compensation judge shall be the limit of the fee received or to be received by the attorney in connection with the claim, subject to the limitation of Subsection I of this section.

D. The cost of discovery shall be borne by the party who requests it. If, however, the claimant requests any discovery, the employer shall advance the cost of paying for discovery up to a limit of three thousand dollars (\$3,000). If the claimant substantially prevails on the claim, as determined by a workers' compensation judge, any discovery cost advanced by the employer shall be paid by that employer. If the claimant does not substantially prevail on the claim, as determined by a workers' compensation judge, the employer shall be reimbursed for discovery costs advanced according to a schedule for reimbursement approved by a workers' compensation judge.

E. In all cases where compensation to which any person is entitled under the provisions of the Workers' Compensation Act is refused and the claimant thereafter collects compensation through proceedings before the workers' compensation administration or courts in an amount in excess of the amount offered in writing by an employer five business days or more prior to the informal hearing before the administration, the compensation to be paid the attorney for the claimant shall be

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fixed by the workers' compensation judge hearing the claim or the courts upon appeal  
in the amount the workers' compensation judge or courts deem reasonable and  
proper, subject to the limitation of Subsection I of this section. In determining and fixing  
a reasonable fee, the workers' compensation judge or courts shall take into  
consideration:

- (1) the sum, if any, offered by the employer:
  - (a) before the worker's attorney was employed;
  - (b) after the attorney's employment but before  
proceedings were commenced; and
  - (c) in writing five business days or more prior to the  
informal hearing;
- (2) the present value of the award made in the worker's favor;

and

- (3) any failure of a party to participate in a good-faith manner  
in informal claim resolution methods adopted by the director.

F. After a recommended resolution has been issued and rejected, but more than ten days before a trial begins, the employer or claimant may serve upon the opposing party an offer to allow a compensation order to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued, subject to the following:

- (1) if, within ten days after the service of the offer, the opposing party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof, and thereupon that compensation order may be entered as the workers' compensation judge may direct.

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An offer not accepted shall be deemed withdrawn, and evidence thereof is not admissible except in a proceeding to determine costs. If the compensation order finally obtained by the party is not more favorable than the offer, that party shall pay the costs incurred by the opposing party after the making of the offer. The fact that an offer has been made but not accepted does not preclude a subsequent offer;

(2) when the liability of one party to another has been determined by a compensation order, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten days prior to the commencement of hearings to determine the amount or extent of liability;

(3) if the employer's offer was greater than the amount awarded by the compensation order, the employer shall not be liable for his fifty percent share of the attorney fees to be paid the worker's attorney and the worker shall pay one hundred percent of the attorney fees due to the worker's attorney; and

(4) if the worker's offer was less than the amount awarded by the compensation order, the employer shall pay one hundred percent of the attorney fees to be paid the worker's attorney, and the worker shall be relieved from any responsibility for paying any portion of the worker's attorney fees.

G. In all actions arising under the provisions of Section 52-1-56 NMSA 1978 where the jurisdiction of the workers' compensation administration is invoked to determine the question whether the claimant's disability has increased or diminished and the claimant is represented by an attorney, the workers' compensation judge or courts upon appeal shall determine and fix a reasonable fee for the services of the

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claimant's attorney only if the claimant is successful in establishing that his disability has increased or if the employer is unsuccessful in establishing that the claimant's disability has diminished. The fee when fixed by the workers' compensation judge or courts upon appeal shall be the limit of the fee received or to be received by the attorney for services in the action, subject to the limitation of Subsection I of this section.

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H. In determining reasonable attorney fees for a claimant, the workers' compensation judge shall consider only those benefits to the worker that the attorney is responsible for securing. The value of future medical benefits shall not be considered in determining attorney fees.

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I. Attorney fees, including, but not limited to, the costs of paralegal services, legal clerk services and any other related legal services costs on behalf of a claimant or an employer for a single accidental injury claim, including representation before the workers' compensation administration and the courts on appeal, shall not exceed sixteen thousand five hundred dollars (\$16,500). This limitation applies whether the claimant or employer has one or more attorneys representing him and applies as a cumulative limitation on compensation for all legal services rendered in all proceedings and other matters directly related to a single accidental injury to a claimant. The workers' compensation judge may exceed the maximum amount stated in this subsection in awarding a reasonable attorney fee if he finds that a claimant, an insurer or an employer acted in bad faith with regard to handling the injured worker's claim and the injured worker or employer has suffered economic loss as a result. However, in no case shall this additional amount exceed two thousand five hundred dollars (\$2,500). As used in this subsection, "bad faith" means conduct by the

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claimant, insurer or employer in the handling of a claim that amounts to fraud, malice, oppression or willful, wanton or reckless disregard of the rights of the worker or employer. Any determination of bad faith shall be made by the workers' compensation judge through a separate fact-finding proceeding.

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J. Except as provided for in Paragraphs (3) and (4) of Subsection F of this section, the payment of a claimant's attorney fees determined under this section shall be shared equally by the worker and the employer.

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K. It is unlawful for any person except a licensed attorney to receive or agree to receive any fee or payment for legal services in connection with any claim for compensation under the Workers' Compensation Act.

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L. Nothing in this section applies to agents, excluding attorneys, representing employers, insurance carriers or the subsequent injury fund in any matter arising from a claim under the Workers' Compensation Act.

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M. No attorney fees shall be paid until the claim has been settled or adjudged.

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N. Every person violating the provisions of this section is guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars (\$50.00) or more than five hundred dollars (\$500), to which may be added imprisonment in the county jail for a term not exceeding ninety days.

O. Nothing in this section shall restrict a claimant from being represented before the workers' compensation administration by a nonattorney as long as that nonattorney receives no compensation for that representation from the claimant."

Section 4. APPLICABILITY.--The provisions of this act are effective for all

injuries in which the worker reaches maximum medical improvement on or after July 1,  
2003. HJC/HB 501,

506 & 613  
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